Time, Difference and the Ethics of Children's Criminal Responsibility

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Almost the only thing that can be said of all children is that they have lived for less time than have all adults. What does it mean to be a child or an adult? As with 'childhood', a concept unable to be contained, adulthood is also a social and legal construct. Those over 18 are deemed adult for all legal purposes.[1] Individuals who would otherwise be classed as 'children' may be deemed legally adult for some purposes.[2] A 16 year old female is legally able to have sex (in most jurisdictions), work for a living, consent to an abortion and be sentenced to detention for a criminal offence, but she cannot vote or sit on a jury or drive a car or buy alcohol. There is no doubt that chronological definitions of legal capacity and responsibility have the advantage of certainty. They also work better in a logistical sense, rather than, for example, attributing legal adulthood by measuring individual competence. Although inaccuracies in the conferral of legal rights may produce a degree of injustice – many of which can be overcome in practice with few consequences – it produces more real injustice for criminal responsibility to be imputed to a child where this then serves

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1 The statutory age of majority in all Australian states is 18 (Minors (Property and Contracts) Act 1970 (NSW) s 9; Age of Majority Act 1977 (Vic) s 3; Age of Majority Act 1974 (Qld) s 5; Age of Majority (Reduction) Act 1970 (SA) s 3; Age of Majority Act 1972 (WA) s 5; Age of Majority Act 1973 (Tas) s 3; Age of Majority Act 1974 (NT) s 4; Age of Majority Act 1974 (ACT) s 5.
Parental powers generally end at the age of 18: (Family Law Act 1975 s 63F)

2 This has been the position for hundreds of years. See Blackstone's Commentaries (1830) 17th ed [orig 1765], Vol 1, 463) where he discusses the various ages of capacity existing then, at least for males: 12 to take the oath of allegiance, 14 to marry, choose a guardian, and make a will (will-making if his discretion be proved), and 17 to execute an estate; these rights were recognised although the age of majority was then 21.

to facilitate that child's detention. Detention constitutes a far more serious consequence than even the unjustified absence of a nominal right. In this discussion I will argue that laws ascribing criminal responsibility to children by age and a simple test of understanding are unjust, at least when they claim to justify detention as a method of retribution.

Laws ascribing criminal responsibility to children in Australia are based on the child's age and their knowledge of the wrongness of their criminal act.[3] Three positions operate in Australian jurisdictions by reference to ages of the child. First, those under 10 cannot be criminally responsible for any act. Second, those between 10 and 14 are also presumed not criminally responsible unless the Crown proves either that the child knew his or her act was wrong or had the capacity to know his or her act was wrong, depending on the jurisdiction. Third, the adult standard of criminal responsibility is applied to children aged 14 years and over. The significance of finding a child offender criminally responsible is that it allows the court to impose a sentence. I agree that children should be held accountable for their criminal acts if they recognise the act's wrongness; and for this broad purpose of accountability, the law of criminal responsibility is in fact too low in light of evidence from developmental psychology. However, my argument here is that in general, the practice of finding child offenders criminally responsible in order to justify sentencing them to custody is ethically questionable.

Juvenile justice laws in Australia give courts sentencing options that include the custodial detention of child offenders, albeit in most cases as a last resort.[4] The provision that custody should be a last resort, with other

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[3] Throughout this discussion I use the term 'child' to denote those under 17.

[4] See for example Juvenile Justice Act 1992 (Qld) ss 4(c), 109(2)(e); Children (Criminal Proceedings) Act 1987 (NSW) s 33(2); Children and Young Persons Act 1989 (Vic) s 138; Young Offenders Act 1993 (SA) s 23(4); Youth Justice Act 1997 (Tas) s 5(g). The Young Offenders Act 1994 (WA) s 7(h) makes detention a last resort but this is at odds with other provisions in Western Australian legislation. Indeed, in Western Australia and the Northern Territory there is mandatory detention for juveniles in some circumstances – by both applying adult mandatory sentencing legislation to juveniles for certain repeat offences, eg violence (Crimes (Serious and Repeat Offenders) Sentencing Act 1992 (WA) with the Sentencing (Consequential Provisions) Act 1995 (WA), and for repeat property offences: Criminal Code Amendment Act 1996 (WA) and in NT through the Sentencing Amendment Act 1996 (NT) and the Juvenile Justice Amendment Act 1996 (NT). In WA see the Criminal Code s 401(4) which imposes mandatory detention on juveniles for home burglaries for at least 12 months if convicted twice previously for like offences, and can extend detention for 18 months (YOA (WA) ss 126-128). In NT there is mandatory detention of at least 28 days for juveniles between 15 and 17 convicted of 'property offences' (widely defined in JJA Schedule 1 and CC (NT) Part VII Div 1) if they have previously committed one (JJA (NT) ss 53AE-AG). Although not examined in detail in this discussion, these extreme positions are vulnerable to attack on grounds including the breach of the separation of powers doctrine, discrimination by age, breaching common law principles of proportionality in sentencing, and the breach of international law making detention of child offenders a last resort (see for example the United Nations Convention on the Rights of the Child Article 37(b); the United Nations Guidelines for the Protection of Juveniles Deprived of their Liberty, GA Res 45/113, 14 December 1990, paragraph 1; and the United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), GA Res 45/112, 14 December 1990, paragraphs 2-3.

sentencing provisions peculiar to juveniles, exemplifies the courts' generally more lenient approach to child offenders than to adult offenders. It arguably also reflects the acceptance that as a rehabilitative tool, custody is ineffective and instead simply serves as a retributive measure and or as a justified measure if needed for the protection of the public.[5]

In the context of this discussion, it is significant to establish at the outset that despite the general welfare-based tenor of sentencing legislation, this option for sentencing child offenders to custody does not appear to be used sparingly by the courts. Statistics published by the Australian Institute of Criminology, drawn from data submitted by government departments, show that at 31 December 2000 there were 590 children aged between 10 and 17 detained in juvenile correctional institutions throughout Australia.[6] These statistics also show a staggering over representation of two sectors of the child population: male offenders and indigenous male offenders.[7] These outcomes of the law's application to children are disturbing not simply because of the number of children detained, but because children from particular sectors of the population are affected.

Since it is necessary to find a child criminally responsible before it is possible to sentence him or her to detention, my focus here is on the legal mechanisms of attributing criminal responsibility to children. In challenging Australian legal positions, I will consider three factors: time, difference and the ethics of punishing young offenders.[8] First, law tries to essentialise children by claiming that all children of a certain age have identical cognitive skill. Second, law claims that all children of a certain age have identical cognitive understandings of the rightness and wrongness of particular acts. Third, law claims that criminal responsibility sufficient to impose custodial detention is justifiably imposed on child offenders simply by testing cognitive knowledge of the wrongness of their act.[9]

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5 This discussion assumes that detention of juveniles does not serve, if at all, as effectively as other options might to develop the skills necessary for the offender not to reoffend.

6 Australian Institute of Criminology (2001) Persons in Juvenile Corrective Institutions 1981-2000 with a Statistical Review of the Year 2000, Table 6(c), http://www.aic.gov.au/stats/juveniles/2000/index.html. Even this figure is conservative as there are other forms of detention this figure may not include – see Australian Law Reform Commission (1997) Report No 84, Seen and Heard: Priority For Children in the Legal Process, Canberra: Australian Government Publishing Service, 57.

7 Australian Institute of Criminology (2001) above n 6. Table 6(a) shows that of the 590 detainees, 549 are male. Table 6(b) shows that the balance, 41, are female. Table 6(a) also shows that of the 549 male detainees, 222 are Indigenous. Table 6(b) demonstrates that a similarly high proportion of female detainees is indigenous: 17 of the 41. To anticipate a possible question, it does not seem that the jurisdictions having mandatory sentencing legislation disproportionately affect these figures, as the following breakdown of the 590 detainees by jurisdiction shows: NSW – 221; Vic – 55; Qld – 77; WA – 97; SA – 64; Tas – 35; NT – 26; ACT – 15 (Table 6(c)).

8 Clearly, the ethics of treating any offender by punishment alone is a relevant related topic, but is not addressed here.

9 I accept that other factors are considered – or are supposed to be considered – at the sentencing stage. However, from the statistics available of detained children it is arguable whether detention really is being consistently used as a last resort.

This discussion rejects these claims on theoretical and ethical grounds. In Part 1 I will first set out the law and explain how it developed to this point, emphasising the attributes the law deems relevant and irrelevant for the purpose of imputing criminal responsibility. Then I will demonstrate that based on its current tests, the law results in inaccurate imputations of responsibility and irresponsibility. I will draw on evidence from developmental psychology to argue that all children of the same age do not have the same cognitive skill. I will argue further that all children of the same age do not have the same cognition of right and wrong. Rather, depending on social, cultural, familial and personal characteristics, an individual child may have atypical or 'different' understandings of right and wrong. However, even apart from these objections, there remains a fundamental flaw in the ascription of children's criminal responsibility.

In Part 2, I will argue that it is ethically wrong to ascribe criminal responsibility to a child offender in order to justify detention (solely by assessing cognitive ability).[10] Such an assessment ignores the offender's personal circumstances and ignores attributes that I argue are essential for imputing true moral agency to justify punishment alone; skills such as the capacities of empathy and of control of conduct. Children generally occupy early stages in the development of cognition, morality and control of conduct. Further, and this applies especially to those children in the sectors most affected by the criminal law, children have not had much time to overcome what might be described as a less than ideal environment in which to develop the skills and conditions that lessen the likelihood of criminal offending. In this context, which is wider than that currently considered by law, it is not ethically justifiable to hold such offenders criminally responsible, and to sentence the offender to custody, except if needed for public safety.[11] I will conclude that a consideration of qualitative differences in young offenders leads to the realisation that in nearly all cases, sentences other than detention are more ethically, theoretically and practically justifiable.

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[10] Again, this argument may well have parallels when considering adult offenders but such arguments lie beyond the scope of this paper.

[11] I accept that my arguments about dispositional consequences may not apply to child offenders who satisfy traditional legal requirements of responsibility and my additional capacities, and who have had a 'good' childhood and yet who still commit serious, violent crime.

Part 1: Criminal law's preoccupation with age and cognition as the decisive factors of children's criminal responsibility, and its ignorance of other factors

Age and cognition: criminal responsibility and children

Statutory provisions in all Australian jurisdictions now set the minimum age of criminal responsibility at 10, so that children under 10 cannot be found criminally liable for any act.[12] These children are irrebuttably presumed incapable of possessing criminal intention and so are excused from all criminal responsibility. The courts cannot impose any sentence on these offenders. In contrast, children 14 and over are treated automatically as having the same degree of criminal responsibility as adults.

Children aged between 10 and 14 are also deemed incapable of possessing criminal intention, but here the presumption is rebuttable.[13] In common law jurisdictions, if the Crown proves beyond reasonable doubt that the child knew at the time of committing their act that it was seriously wrong and not simply naughty or mischievous, then the child is deemed to possess criminal intention.[14] Law uses this conclusion to justify the child's culpability; the child's malicious intention is thought sufficient to override the presumed innocence of low age.[15] This conclusion of culpability – blameworthiness – then is used to justify the State's imposition of legal sanctions. In jurisdictions having statutory tests, the test is different and arguably even easier to satisfy than the common law test. If the Crown proves beyond reasonable doubt that the child had the capacity to know that they ought not to have done the act at the time they committed it, then the child is proved to possess criminal capacity and is responsible for their act.[16] Statutory provisions demanding only

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[12] Criminal Code 1899 (Qld) s 29(1); Children (Criminal Proceedings) Act 1987 (NSW) s 5; Young Offenders Act 1993 (SA) s 5; Children and Young Persons Act 1989 (Vic) s 127; Criminal Code 1913 (WA) s 29; Criminal Code 1983 (NT) s 38(1); Children and Young People Act 1999 (ACT) s 71(1); Criminal Code 1924 (Tas) s 18(1); Federal legislation has the same effect (Criminal Code Act 1995 (Cth) s 7(1); Crimes Act 1914 (Cth) s 4M).

[13] Note the New South Wales proposal in 2000 to reduce the upper age from 14 to 12: Discussion Paper released 10 January 2000 by Jeff Shaw, NSW Attorney-General.

[14] This English common law principle was established in R v Gorrie (1918) 83 JP 136, and was confirmed by the House of Lords in C v DPP [1995] 2 WLR 383. However, in England the rebuttable presumption of doli incapax for children between 10 and 14 has now been abolished: Crime and Disorder Act 1998 (UK) s 34. The former English common law position has been adopted and remains authoritative in Australian common law jurisdictions: New South Wales (Ivers v Griffiths (unreported) Supreme Court of New South Wales Common Law Division, 10255/98 22 May 1998, Newman J), South Australia (R v M [1977] 16 SASR 589) and Victoria (R v Whitty (1993) 66 A Crim R 462)

[15] This is a rough translation of the Latin maxim malitia supplet aetatem: malice overcomes non-age.

[16] Criminal Code 1899 (Qld) s 29(2); Criminal Code 1924 (Tas) s 18(2); Criminal Code 1983 (NT) s 38(1); Criminal Code 1913 (WA) s 29; Children and Young People Act 1999 (ACT) s 71(2). Federal legislation makes children aged between 10 and 14 criminally responsible

the child's capacity to know they ought not to do the act are theoretically much wider than those demanding direct knowledge that they ought not to do the act. This is because the particular act committed may have been beyond the individual's knowledge of right and wrong, but if they display a general capacity to know right from wrong acts then they will still be found responsible and culpable. However, this point is academic because of the general misapplication of the law.

Despite the presence of the rebuttable presumption for those between 10 and 14, it rarely operates in the defendant's favour regardless of the jurisdiction. What originated as a protective presumption of irresponsibility to protect young offenders from harsh punishments has now been read down and often simply ignored, so that children of 10 or more are usually at best judged for normalcy for their age. If found to be of normal intelligence for their age, a child is deemed to know the difference between right and wrong and from that to know whether certain acts are right or wrong. This is a generic judgment of children who occupy a society featuring compulsory education and media and information saturation, and this judgment is perhaps motivated by a cynical perception of children who no longer inhabit a time of innocence for long.[17]

For the moment, to use a crude reference to age for convenience and because there is relevant expert evidence to support me, I will concede that virtually all children over 7 know that certain acts are 'wrong', albeit in different senses. For example, stealing, bashing someone with a brick, breaking into someone's house. I will also make the point here that it is not the lack of cognition that justifies the defence of criminal irresponsibility for the purpose of detention, but the lack of other vital skills. I will return to these points later to argue why it is morally unjust to impute full criminal responsibility to children only by assessing their cognition of wrong. The next immediate task is to portray the development of the cognition test, as this shows us the foundations and assumptions upon which the law operates upon.

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only if the child 'knows that his or her conduct is wrong': Criminal Code Act 1995 (Cth) s 7(2); Crimes Act 1914 (Cth) s 4N(1). Jurisdictions with statutory tests for those between 10 and 14, which frame the question not as whether the child knew the act was wrong, but as whether the child knew they ought not do the act, produce no substantive difference but merely attempt to avoid the problems inherent in the use of the word 'wrong'.

17 Regarding the practice of ignoring the presumption: Lord Lowry in C v DPP, above n 14, 402; M v AJ (1989) 44 A Crim R 373; S Scarlett (1997) 'Doli Incapax And The Age Of Criminal Responsibility', Paper presented at the Children And The Law conference, Continuing Legal Education Department, St Leonards, New South Wales, 97/19, 63-67. Regarding the practice of normalisation, ie the idea that all children of x age know the difference between right and wrong, that y act is wrong, that the defendant is normal, and of x age and committed y act, therefore the defendant is criminally responsible: S Scarlett; Lord Lowry in C v DPP, above n 14, 396-399; Forbes J in JBH and JH v O'Connell [1981] Crim LR 632. Regarding the expectation that children in contemporary society must know the difference between right and wrong and therefore must know that a particular act was wrong: Laws J in C v DPP [1994] 3 WLR 888 at 894; Forbes J in JBH and JH v O'Connell, above n 17, 632; R v M [1977] 16 SASR 589.

The legal history of criminal responsibility and children

Evidence regarding the treatment of young offenders in the Middle Ages is somewhat sketchy and inconsistent due to few and vague reports, and irregular judicial practice. However, until the mid 1700s, it seems that children generally received little beneficial treatment, being treated as miniature adults for most purposes in society including that of criminal punishment.[18] Accordingly, there are regular records of children as young as 7 being sentenced to death.[19] However, despite infancy being no defence, it seems that there was some concession for the child's young age, in the greater likelihood of child offenders receiving pardons.[20] The practice was for the judge to estimate the child's age simply by making a judgment based on the child's physical appearance.[21] If the judge was uncertain, information could be sought from relatives.

Change occurred as the English conception of childhood changed. This more benevolent attitude begins to give at least some formal recognition of children's qualitative difference from adults, even if limited to cognitive ability. Judicial evidence of this is exemplified in 1456 with Moyle J declaring that judges could pardon a child defendant "if it appears to them that he had no discretion."[22] Discretion here means the ability to discern good from evil; right from wrong. This is the entrance of the cognitive test, which in the ensuing half millennium has not developed much further.

This exposure to harsh punishment was one reason supporting the rationale for the creation of the *doli incapax* – 'incapable of mischief', and so not criminally responsible – rule. When it was generally accepted that children did not have the same understanding as adults, and that this merited some protection for them from criminal liability, the *doli incapax* presumption was created.

In 1678 the jurist Matthew Hale attempted to settle the legal position. Those under 7 were excused liability for all offences. Those over 14 were treated as fully responsible adults. Those between 7 and 14 were rebuttably *doli incapax*.[23] Hale emphasised that even if the presumption was rebutted for a child aged between 7 and 14, the court could mitigate

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[18] N Postman (1994) The Disappearance of Childhood, New York: Vintage, 16-17.

[19] W Blackstone (1765) Commentaries, 15th ed, pub'd 1709, 23; I Pinchbeck and M Hewitt (1973) Children in English Society, Volume II: From the Eighteenth Century to the Children Act of 1948, Toronto: University of Toronto Press, 351-353.

[20] A Kean (1937) 'The History of the Criminal Liability of Children', Law Quarterly Review, CCXI 364 - 370, 364.

[21] I Pinchbeck and M Hewitt (1969) Children in English Society, Volume I: From Tudor Times to the Eighteenth Century, Toronto: University of Toronto Press, 7.

[22] Kean, above n 20, 364-366, citing a judgment from 1302 and a statement from the Eyre of Kent from 1313, both saying that children under 7 should be pardoned.

[23] M Hale (1971) [orig 1676, well-known of 1678, published 1736] Pleas of the Crown, Vol 1, London: Professional Books, 19-20. Blackstone confirmed the three basic positions: Commentaries, above n 19, 23-24.

punishment or grant a reprieve before or after judgment – but only for a capital offence.[24]

Although the lower and upper age limits were clearly stated and came to be applied by the courts – whether or not because of Hale – confusion surrounding those between these ages is evident even here; a harbinger of future discord. Of those between 7 and 14, Hale thought that those between 7 and 11 were no longer *infantia* (infants), but nor were they *aetatis pubertati proxima* ('the state approaching maturity' ie 12 to 14). Children between 7 and 11 were hence presumed rebuttably *doli incapax*. Children between 12 and 14 were also presumed *doli incapax* but were attributed more physical and emotional maturity, and this justified a weaker presumption of irresponsibility.[25]

To rebut the presumption for children between 7 and 11, the prosecution had to prove two things. First, that the child had "the discretion to judge between good and evil at the time of the offence committed"; and second, that there was "very strong and pregnant evidence...to convict one of that age, and to make it appear that he understood what he did." These two requirements hence require first, a capacity to make moral judgments, and second, an apparently more simple cognitive understanding of the act committed. According with his earlier comments, Hale thought that much more evidence of criminal capacity was needed to justify convicting children under 12.[26]

Cases from the 1700s and 1800s demonstrate further stabilisation of the law. William York's case in 1748 is one of the earliest reported cases of children who have committed criminal acts where the question of their criminal responsibility arose.[27] The ten year old defendant had been convicted of murder. He admitted to killing a five year old girl, with whom he had stayed in the care of a parishioner. He had stabbed her to death and buried her in a dung heap. The next morning he was taken before a Justice of the Peace, who heard his confession and ordered him into a room to consider his story because of the serious consequences, warning him 'not to wrong himself'. After some hours in this room, the defendant repeated his confession. At trial this confession, which the defendant had repeated many times by then, grounded his conviction.

The Court referred to the requirement of mischievous discretion in concluding that this was a justified case of capital punishment. The defendant had initially lied about the whereabouts of the girl, and later when the body was found denied having anything to do with her demise. The court justified its finding also on the ground that "it would be of very dangerous consequence to have it thought, that children may commit such atrocious crimes with impunity." The court founded the killing of

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[24] Hale, above n 23, 27.
[25] Ibid 18-19.
[26] Ibid 27.
[27] (1748) Fost 70.

the defendant on deterrent grounds, and on justice to the public.

However, some of the judges (the report is not clear as to how many: 'two or three') thought the defendant should be reprieved in case he had been ordered by an adult to kill the girl. Subsequent reprieves were granted and the original Justice of the Peace was ordered to find out if this had in fact happened. No such evidence was found and the Chief Justice affirmed the death sentence. A Secretary of State intervened with a pardon in 1757 and the defendant was instead ordered into the sea-service.

A group of cases in the 1800s gave a more explicit statement of the law and of its rationale, and these statements served as authority for the twentieth century cases. In 1830 in *R v Owen*, Littledale J states the legal position that child offenders can only be convicted if there is evidence that at the time of offence the child had a guilty knowledge that he or she was doing wrong. The rationale for this position is explained as the fact that children under 14 are presumed not to have sufficient capacity to know of the act's wrongness.[28] This was followed in 1844 in *R v Manley*, although the test was phrased as "whether he knew that he was doing wrong or was acting altogether unconsciously of guilt"; and in 1845 in *R v Smith*, where the test was whether the defendant had a guilty knowledge that he was doing wrong.[29] *R v Smith* also established the rule that this guilty knowledge cannot be proved merely by proving the commission of the act; a position reversed by Australian normalisation of offenders.

This position, limiting the inquiry to the offender's cognitive knowledge of the act's wrongness, is expanded in the 1918 case of *R v Gorrie*, where Salter J stated that the test was whether the defendant knew his or her act was not just wrong but "gravely wrong, seriously wrong".[30] This test seems to comprise both a basic cognitive ability – understanding the nature of the act – and cognition of morality: recognising that the act is 'seriously wrong'. The difficulty and ambiguity raised concerning the defendant's knowledge that the act was 'seriously wrong' and whether this contained a moral element became clear in two English cases in the 1980s.[31]

The 1981 case of *JBH and JH v O'Connell* found that the test of knowledge of wrong did have a moral element, so that in order to be criminally responsible the defendant must know of the moral wrongness of the act.[32]

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[28] R v Owen (1830) 4 C & P 236.

[29] R v Manley (1844) 1 Cox CC 104; R v Smith (1845) 1 Cox CC 260.

[30] R v Gorrie, above n 14.

[31] Developments in the 1950s also occurred; B v R [1958] 44 Cr App R 1 confirming Hale's thought that the younger the child in the middle age range, the stronger the evidence needed to rebut the presumption, and that evidence of the child's background, family and upbringing were relevant for this purpose; and F v Padwick [1959] Crim LR 439 making previous convictions admissible to rebut the presumption.

[32] JBH and JH v O'Connell, above n 17. Note also that the Court here said it was not sufficient to argue that all children of defendant's age would know of the act's wrongness; the prosecution must prove that the defendant had that knowledge. Criticising the presumption, the Court thought that the burden of proving doli incapax should lay with defendant, as contemporary universal education made it ridiculous to maintain that children aged 10 to 14 do not know the difference between right and wrong.

However, in 1984 in *JM v Runeckles* the court, while conceding that the child's knowledge of the act must be that it was seriously wrong, going beyond childish activity which is merely naughty or mischievous, also finds that the test does not contain a moral element. The prosecution did not have to prove the defendant knew the act was morally wrong.[33]

In 1994, reflecting the widespread dissatisfaction with the test and the multitude of problems presented by it, the Court of Queen's Bench in *C v DPP* abolished the rebuttable presumption for those between 10 and 14.[34] This abolition was overturned by the House of Lords, but the comments from the House of Lords and the abolition by the Court of Queen's Bench obviously had some impact; in 1998 the rebuttable presumption of *doli incapax* for children between 10 and 14 was abolished by statute.[35]

As noted above, Australian jurisdictions retain the presumption and their legal positions remain heavily influenced by the English common law positions. The next question is to ask whether the legal positions in Australia, dependent as they are on assumptions about age and cognition, produce accurate results on these bases.

Do the Australian legal positions produce accurate outcomes on their bases?

We have seen that law operates on an essentialised view of children and their characteristics. The law does not inquire into the individual characteristics of children but operates automatically on an assumption that all children of a particular age conform to a type. If an individual is aged below the minimum age at which criminal responsibility attaches, they are not assigned legal culpability. This is the outcome no matter how grave the act and its consequences, no matter how many other criminal acts committed, and no matter what the individual's cognitive development, let alone their intellectual, emotional and conative development. No inquiry is made into these matters. Similarly, if an individual has lived for more than the amount of time set, then they do bear criminal responsibility. The State claims to be justified when ascribing culpability to these individuals. Beyond established defences, it does not matter how limited the individual's cognitive development, let alone the state of their intellectual, emotional and cognitive development. Their personal circumstances, family circumstances, cultural background, experience of 'normal' life, options and resources are deemed insignificant.

Both lower and (effective) upper legal positions produce inaccuracies. My purpose here is to demonstrate that children of certain ages cannot accurately be assumed to have the same levels of cognition or of moral

[33] JM v Runeckles (1984) 79 Cr App R 255.
[34] C v DPP [1995], above n 17.
[35] C v DPP [1995], above n 17; Crime and Disorder Act 1998 (UK) s 34.

reasoning. For this purpose I refer to developmental psychology, and I add weight to the argument by citing admissions of this position from the courts. Further argument regarding the diversity of human subjects is possible from a Postmodern perspective; I engage in this pursuit elsewhere.[36]

Developmental evidence of difference in cognitive ability, moral reasoning

Some developmental psychological theories are more accepted than others, but for my purposes I can identify some fairly uncontroversial positions. Human individuals form thoughts about moral questions in different stages as their cognitive skills develop. The Swiss psychologist Jean Piaget first developed a model of this development, and Harvard's Lawrence Kohlberg expanded on this research.[37] Kohlberg identified three levels of development, which each contained two stages.[38]

On Kohlberg's scheme, Level 1 is Preconventional Morality. Stage 1 is characterised by the individual acting in accordance with commands and by the fear of punishment; the actual consequences – punishment or no punishment – of an act determine if it is moral (right or wrong). An example is of a toddler who does not touch the kettle when her parent tells her not to because it is hot, and by the threat of disapproval if she disobeys. Stage 2 sees the individual follow a rule when it is in his or her immediate interest, or if a personal benefit will result. An example here is of a nine year old who does his homework because he has been promised a reward. Acclaimed research indicates that Stage 2 reasoning is prevalent at around age 10.[39]

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[36] B Mathews, "Why Deconstruction Is Beneficial" (2000) 4,1 Flinders Journal of Law Reform 105-126.

[37] J Piaget (1977) The Moral Judgement of the Child, Penguin, Harmondsworth. The first stage is the morality of constraint, where external commands are simply obeyed without reflection, considering at most the objective consequences of the act. The second stage is characterised by the child considering the intention and subjective feelings involved in the situation, not just the objective results. This is claimed to equate to an internalisation of external norms, and Piaget thought this began around age 7. The third stage, which allegedly appears at adolescence (hardly accurate) extends stage two to embed an internalised morality and to apply it in a consistent way, and relates rules' origin to co-operation and mutual concerns.

[38] See generally J Ta and L Kohlberg (1971) 'Developing Senses of Law and Legal Justice', Journal of Social Issues, 27 (2), 65-91; L Kohlberg, C Levine and A Hewer (1983) Moral Stages: A Current Formulation and a Response to Critics, New York, Karger; L Kohlberg (1981) Essays on Moral Development: Vol 1 The Philosophy of Moral Development, San Francisco, Harper & Row; and more recently J Snarey (1985) 'Cross-Cultural Universality of Social-Moral Development: A Critical Review of Kohlbergian Research', Psychological Bulletin 97, 202-232; H Bee (2000) The Developing Child 9th ed, Needham Heights MA: Allyn & Bacon, 361-366.

[39] L Walker (1987) 'Moral Stages and Moral Orientations in Real-Life and Hypothetical Dilemmas', Child Development 60, 157-160; A Colby and L Kohlberg (1983) 'Longitudinal Study of Moral Judgment', Monographs of the Society for Research in Child Development 48, 1-2, Serial No 200.

Level 2 reasoning is Conventional Morality, which encompasses stage 3 and stage 4 and is most common in adults. Stage 3 sees individuals consider moral behaviour through the perception of a significant group of people; family, peer group, church, culture. In Stage 3, perceptions of good behaviour are influenced by what significant others also perceive as good behaviour. The research also shows that stage 3 reasoning becomes dominant at around age 16. Here the child does their homework not from being motivated by fear of punishment, nor from the inducement of a reward. Here the motivation might be that their siblings or peers work hard too, or because there is an expectation from their parents that they will try reasonably hard to do well at school, or that academic achievement is valued by their school or by their culture. Of course, there may be elements of Stage 2's personal benefit present too. Stage 4 advances to see the individual consider larger social groups or the society as a whole.

Rarely achieved, Stages 5 and 6 comprise Postconventional or Principled Morality. Here the individual consults a different source of guidance for their moral conclusions. Stage 5 elevates social utility and individual rights; the principles that guide the individual's moral decisions are self-selected. Laws are respected but are not omniscient. Stage 6 extends this, with the individual seeking and consistently honouring universal ethical principles of their choice.

Two points need to be made here. First, Piaget, Kohlberg and subsequent experts accept that individual's progress through cognitive and moral decision making phases in *stages*, not by magically defined *ages*, so that different individuals reach these stages at different times.[40] The human individual's progress through these abilities cannot be accurately measured by time spent alive. A child who has precociously reached stage 4 could be the same chronological age as another child who is in stage 1 or 2. Similarly, an adult who has reached Kohlberg's Stage 6 may be the same age as another adult who is in Stage 2 or 3. Some individuals will never get beyond stage 3 of Kohlberg's scheme. Therefore, inaccurate results are bound to ensue if the legal sense of wrong is confined to one, some or all of these stages' senses of wrongness. I will return to this issue of the law's sense of wrong shortly.

A short digression is appropriate here to reinforce this point about the relevance of developmental evidence and to repel the objection that law has not considered such evidence and never would. Legal discourse in both England and Australia has explicitly recognised this developmental fact of progression through stages in moral cognition by stage and not by age, and has used this fact to motivate judgments. The majority of the House of Lords in the 1986 case of *Gillick* said that parental power to consent to medical treatment on behalf of their child decreases gradually as the child's maturity and capacities develop, and that this rate of

[40] See for example J Dalby (1985) 'Criminal Liability In Children', Canadian Journal Of Criminology, 27, 2, 137-145, 140-141.

development depends on the peculiarities of the individual child.[41] Lord Scarman said that under this principle, a minor could give informed consent on the attainment of 'a sufficient understanding and intelligence to enable him or her to understand fully what is proposed.'[42] This 'understanding' includes appreciating not only the nature of the advice and what is involved in a physical sense, but also understanding connected moral and family-related questions: changes in the person's relationship with his or her parents, problems regarding the emotional consequences of pregnancy and or termination, and health risks associated with sexual intercourse. An age of sufficient discretion is here defined as "the attainment by a child of an age of sufficient discretion to enable him or her to exercise a wise choice in his or her own interests."[43] This refers to 'age' but what is really meant is intellect, which includes not simply understanding of facts but of emotional values and deeper concepts too, as seen from the comments above and from these following:

> "If the law should impose upon the process of 'growing up' fixed limits where nature knows only a continuous process, the price would be artificiality and a lack of realism...the 'age of discretion' cases...do reveal the judges as accepting that a minor can in law achieve an age of discretion before coming of full age."[44]

In Australia in 1992, the High Court in *Marion's* case accepted the persuasive authority of *Gillick*.[45] The court accepts the declining force of parental

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41 Gillick v West Norfolk and Wisbech Area Health Authority and Department of Health and Social Security [1986] 1 AC 112. The House of Lords discusses these issues in the context of deciding whether a girl under 16 (the age of consent) could nevertheless give her own consent to receive contraceptive advice and treatment, without parental consent. The plaintiff wrote to her local health authority seeking an assurance that no contraceptive advice or treatment would be given to any of her five daughters while under 16 without the mother's knowledge and consent. The health authority refused to give this assurance, stating that the final judgment rested with the doctor. The plaintiff sought a declaration that the Health Authority's guidance policy to this effect gave advice that was unlawful, either because it breached the legal age of consent, constituted criminal conduct, or encroached unlawfully on parental rights. The House of Lords (3:2 – majority of Fraser, Scarman and Bridge LL) held that contraceptive advice and treatment were medical matters with no statutory limit on the age of recipients of such advice and treatment (182). It was further held that a girl under 16 possessed the legal capacity to consent to medical examination and treatment including contraceptive advice and treatment, provided she had sufficient maturity and intelligence to understand the nature and consequences of the treatment (189). It was also held that the parental right, deriving from parental duty, to control a child was a gradually decreasing one which existed for the child's protection, and that this right cannot be fixed by age, but by the intelligence and understanding of the particular child (186). A parent's right to decide whether a child under 16 should or should not receive medical advice and treatment ended on the child attaining sufficient understanding and intelligence to make the decision. The guidance by the health department was therefore lawful.

42 Ibid 189.

43 Ibid 188.

44 Ibid 186-187.

45 Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case) (1992) 175 CLR 218.

authority as a child's intelligence and maturity develops, and the existence of a minor's capacity to give consent to medical treatment when he or she has attained enough understanding and intelligence to understand what the treatment involves. The comments below are significant:[46]

> "This approach, though lacking the certainty of a fixed age rule, accords with experience and with psychology. The psychological model developed by Piaget...suggests that the capacity to make an intelligent choice, involving the ability to consider different options and their consequences, generally appears in a child somewhere between the ages of 11 and 14. But again, even this is a generalisation. There is no guarantee that any particular child, at 14, is capable of giving informed consent nor that any particular ten year old cannot...even intellectually disabled children cannot be presumed to be incapable of giving independent consent to medical treatment. The capacity of a child to give informed consent to medical treatment depends on the rate of development of each individual."[47]

The second point is that the sense of the concept 'wrong' in the law's tests can be applied to at least any subject capable of speech and answered in the positive although according to the subject's conception of wrong, which may well differ from the law's. This is not surprising since the test developed around the principle that once an individual could speak, which was estimated as 7, then that individual was an adult for most purposes; the individual participated in life as adults did, doing the work of adults, socialising with adults, and engaging in the same activities as adults. The test of wrong, not being defined as 'morally wrong' or 'legally wrong' can be satisfied by individuals at *any* of these stages, because at all stages individuals have a sense of what is wrong; but their sense of

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[46] Marion, electronic version, Austlii, 6 of 59.

[47] Marion, above n 46, 7 of 59. Marion (a pseudonym), 14, had an intellectual disability. Her parents applied to the Family Court of Australia for an order authorising a hysterectomy (to prevent pregnancy and menstruation, which would cause psychological and behavioural consequences) and an ovarienectomy (to balance hormonal changes to control stress and behavioural responses) on Marion. Alternatively, they sought an order authorising them to consent to these procedures on behalf of their daughter. There was previously no High Court authority about whether a parent as guardian could authorise sterilisation of one who is disabled by age and mental incapacity from giving independent consent.

The majority concluded that to ensure the best interests of the child, parents should not have the power to consent on their child's behalf to sterilisation procedures, and that instead, the court's authorisation was required as a procedural safeguard (13 of 59). This procedural safeguard was necessary because: sterilisation was major invasive and irreversible surgery; there was a significant risk of the wrong decision being made (either about the child's present or future capacity to consent independently, and or about what the best interests of the child really were); and because the consequences of a wrong decision were serious. Several forces created the risk of a wrong decision (14-15 of 59). Interestingly, one of these was the opinion that a decision made by the parents could be swayed by their interests, which could conflict with the best interests of the child, detracting from the best interests of the child being promoted – a clue as to the declining force of parental power generally?

wrong is derived from different reference points and may well differ from that envisaged by the court.

Legal tests of knowing an act was 'wrong' or having the capacity to know the act was wrong seem to conflate a cognitive ability and a judgment of the act's moral or legal wrongness, or wrongness on some other definition. Cases do not define 'wrong' as legally wrong because of the general principle that ignorance of the law is no excuse; so that an offender does not have to know that an act is legally wrong to be responsible and culpable for it. However, apart from cases like *O'Connell* and *A v DPP*[48] where this question is engaged with, the courts have been reticent to declare this meaning of wrong as being morally wrong; so the court insists in *Runeckles*, for example, that morality is not involved. The reason for this is that morality is not meant to be an explicit part of the law, and this is because morality is a subjective creature, one peculiar to individuals and circumstances; an altogether slippery concept. An interesting formulation of the concept is found in *R v M*, where the court asks whether the child knew the act would be such as in any ordered society would bring punishment.[49]

It seems that from a contemporary perspective the sense of wrong for which we impute criminal responsibility is that of Kohlberg's Stage 3: good or right behaviour is that promoted by the child's influential group of people – in the legal context this would be constituted by society. However, within this stage an influential group could also be one promoting undesirable behaviour which although not 'right' in the sense most people would ordinarily use the term, could be 'right' or desirable in another sense, leading to the possibility of an act being viewed as right according to some perceptions and wrong at the same time if holding a recognition that the act is legally wrong.

An influential group here could be a peer group, a family, or a cultural group. A homeless gang member who robs a liquor store under threat of expulsion, or under promise of inclusion, could think the act is eminently right. An act of incest could be right to a twelve year old boy raised in an atmosphere of sexual abuse who is operating under the omnipotence of an abusive father and/or mother. An apprentice participating in the gang rape of a stablehand according to the custom of the local horse racing community could think it is acceptable. Boys at boarding school committing sexual assaults on other boys according to the school's apparent tradition could think them acceptable. An indigenous boy could think that breaking into a house with his friends to find money for food or alcohol is right.

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[48] [1992] Crim L Rev 34; see also G Williams (1954) 'The Criminal Responsibility of Children' Crim L Rev 493, 494.

[49] R v M, above n 14.

Conclusion of Part 1

In concluding Part 1, I will set out two positions. Firstly, I argue that it is desirable to make a child accountable for his or her criminal acts, and if needed, to educate them in the skills they do not possess sufficiently that they avoid reoffending, and that this should happen. From this position I can accept that despite the problems set out above, most children of 7 and over who commit criminal acts will satisfy the requirement of understanding that their act was wrong in a stage 3 sense, for the purpose I think relevant, which is accountability and treatment, but not punishment. This is borne out by developmental experts' opinions, which accept that most children by age 7 have sufficient cognitive understanding of an act's wrongness for the purpose of criminal responsibility.[50] Notwithstanding inevitable inaccuracies that will characterise any age-based system of ascription, I can accept the setting of an age of criminal responsibility based on this evidence.[51] Of course, as noted above, there will be some children under 7 who escape this while being at the cognitive stage required, and others who are over 7 who are not at that cognitive level. However, these exceptions would be rare enough to justify the convenience of setting the low age level, and the nature of child offending in Australia – where violent offences are rare – would mean that risk of public harm is rare. This position would mean that any child offender of 7 would be brought within the jurisdiction of the criminal law. Indeed, should the offender over 7 who does not possess cognition of the act's wrongness become accountable and eligible for rehabilitation, so much the better.[52] In general,

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[50] M Siegal 'Children's Rights and Responsibilities from the Perspective of Developmental Psychology and the Law' in R Cummins and Z Burgess (eds) (1985) Age and Criminal Responsibility in Children, Australian Psychological Society, Parkville, 45-50, 46, supporting the cognitive presence but maintaining that children lack adult levels of behaviour control so that children should be held only partially responsible; R Cummins 'The Psychological Implications of Linking Age with Criminal Capacity in Children: A Speculative Synthesis' in Cummins and Burgess, above n 50, 133-137, 134, accepting that very young children generally have sufficient cognition for this purpose but have underdeveloped ability to control behaviour pursuant to that cognition; J Dalby, above n 40, 140; L Micucci (1998) 'Responsibility and the Young Person', Canadian Journal of Law and Jurisprudence, 11, 2, 277-309, 305-307.

[51] Walkover argues that 'the data suggest the internal coherence of the infancy defence. That is, the research indicates that children under seven generally lack the capacity to be culpable, that it is problematic whether children in mid-childhood have that capacity, and finally, that adolescent children may be generally regarded as possessing the capacity to be culpable, although quite often not at the level one would expect of a mature adult.' Walkover uses this point to argue for the retention of a dual system of culpability that makes juvenile offenders accountable for their acts, but are recognised as being less culpable than adult offenders: A Walkover (1984) 'The Infancy Defence In The New Juvenile Court', University of California Law Review 31, 503, 543.

[52] I acknowledge the historical problems with bringing children within the scope of a criminal justice system which attempts to employ a welfare-based approach using justice-based structures, particularly that this will have the effect of unjustifiably increasing the number of children within its ambit. I am predicating all my comments on successful

the purpose of finding these offenders responsible is to facilitate their rehabilitation, not to punish them. Accountability and prevention of reoffending is sought, not punishment.

My second position is that it is not morally justifiable to impute criminal responsibility to children by only testing their cognition and then to use that imputation of responsibility to justify detaining them in custody. I differ from laws and theorists like Micucci who not only argue for the low age level of responsibility on this purely cognitive evidence but who extrapolate that full moral agency is also present, which would justify all dispositional consequences including detention.[53] My argument depends on the subsequent position that it is skills apart from cognition that are vital in imputing full moral responsibility to justify punishment, and that these skills are generally not present in young children (and particularly in child offenders) and cannot always reasonably be expected to be present. These requirements of full moral agency and responsibility are addressed in Part 2.

Part 2: The ethics of children's criminal responsibility – why skills other than cognition are requirements of moral agency

The requirements of liability and culpability to impose the criminal law

Imposition of criminal law first depends descriptively on the individual's liability, and then normatively on the individual's culpability. From the root *ligo*, meaning to bind or to be bound, liability to penalties can be found by factual investigation, to discover if the accused committed the act in question. The general rule is that to establish criminal liability, there must be a guilty act and a guilty mind.[54]

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programs of intervention in justified situations; a loaded assumption and a problematic task, I accept. Perhaps a welfare-based system beyond the criminal system is justified, particularly in light of the experience in Scotland and other countries such as Norway and Denmark: see J Pratt (1993) 'Welfare and justice: incompatible philosophies' in F Gale, N Naffine and J Wundersitz (eds) Juvenile Justice, St Leonards: Allen & Unwin, 38-51, 48-50. It is not my intention in this paper to argue for a particular model, but to argue that there are extremely limited circumstances in which child offenders can be ethically detained in custody.

[53] Micucci, above n 50, 307-308. It should be noted that Micucci accepts that the finding of responsibility does not preclude the imposition of different sentences on these offenders; but this is inconsistent with a finding of full moral responsibility. Why should children be sentenced more leniently than adults if they are just as responsible and culpable as adults? Morse also grapples with this question.

[54] Sweet v Parsley [1970] AC 132. The two elements are often referred to by their Latin translations; actus reus and mens rea respectively.

An individual who breaches the criminal law is primarily accountable to the State because they have breached its positive law. There may be additional elements adding to this accountability, especially if another individual – who is a part of the liberal society – has been harmed in the course of the individual breaching the criminal law. Traditional justifications for the criminal law are also asserted here to justify State action: deterrence (to maintain general order and lawfulness), retribution (to punish the individual wrongdoer) and rehabilitation (to ensure the offender does not offend again).

However, culpability is also required for criminal law to be imposed, and this is generally assumed by the criminal law to be present. To escape this assumption, a defendant must use one of the law's excuses, such as insanity or duress. From the root *culpo, culpa,* meaning blame, culpability is a normative judgment that ascribes blame to the individual for committing the act. Culpability justifies punishment because the individual alone bears the blame – not the situation, nor another individual, nor the State. The legal and political ingredient of blame allows the State to impose sanctions with its conscience intact.

What qualities should be present in a culpable moral agent?

The requirement of culpability derives from the principle that the liberal State cannot punish an individual who does not bear blame for their act. To impose culpability justly, the liberal model of law and society is generally accepted as requiring that a person must possess understanding, reason and control of their actions.[55] The English jurist Hart explains that understanding is the ability to understand what conduct legal rules or morality require; reason is the ability to deliberate and reach decisions concerning these requirements, and control of conduct is the ability to conform to decisions when made.

For the purpose of this discussion, I will confine my comments to understanding and control of conduct. I perceive reason as the ability to think about what to do in light of the understanding: I should do this because I understand the situation. In this context I do not think the element of reason adds much, whereas the element of control of conduct provides more

[55] Hart, H. (1968) Punishment and Responsibility, New York: Oxford Univerity Press, 227-228; Micucci, above n 50, 287; P Arenella (1992) 'Convicting The Morally Blameless: Reassessing The Relationship Between Legal And Moral Accountability', University of California Law Review, 39, 1511, 1517. Stephen Morse accepts that moral fault is at least a necessary condition for just punishment: (1998) 'Immaturity And Irresponsibility', Journal of Criminal Law and Criminology, 88, 1, 15-67, 16. Exemplifying this also is Walkover, who thinks that criminal law operates on the presumption that 'we will punish where the accused has the capacity to understand the substantive nature of acts we consider right or wrong, to generate an internalized set of moral values and, in most jurisdictions, to exercise control over impulses that conflict with such values.' 539.

ground on which to argue. Control of conduct is actually performing your reasoned conclusion about what is legally and or morally desirable.

For child offenders, the element of control of conduct is more nuanced than the typical offerings of criminal law texts. I am not confining my discussion of control of conduct to such circumstances as the interference of outside agencies with an actor's behaviour, or the untimely onset of loss of physical control from some involuntary muscular activity. For children, who inhabit volatile developmental stages in emotional and behavioural senses, and who have not had time to overcome less than ideal environments in which to develop these skills, the aspect of control of conduct is different from that commonly held by adults. Unexplored and unarticulated, control of conduct in legal discourse may not enlighten us as to the requirements of an adult moral agent, and as we have seen, law does not inquire into this element for the purpose of imputing criminal responsibility. However, comments from experts in law and other relevant disciplines reinforce the need to examine and consider this element especially in the context of child offenders.

For example, consider this statement by Stephen Morse, an American professor in psychiatry and law, who thinks there are moral reasons to exempt very young children (ages not defined) from criminal responsibility. Very young children are not criminally responsible because they lack the capacity to:

> "understand *and be guided* by good, normative reason...not to breach an expectation...It would be unfair to hold responsible and blame [children] because they do not deserve it."[56]

The exemption is founded here not simply on lack of understanding, but on the inability to control conduct if understanding (of wrongness in any sense) does exist. Here the reference to guidance must refer to behaviour control.

Those of low age (Morse does not define age brackets for his propositions but instead uses terms such as 'children', preadolescents, midadolescents and adolescents, and adults) are excused by the criminal law because of their irrationality; what Morse calls normative incompetence:

> "Rationality or normative competence is the most general, important prerequisite to being morally responsible...it means that the agent has the general capacity to understand *and to be guided by* the reasons that support a moral prohibition that we accept. The agent can be incapable of rationality in two different respects: either the agent is unable rationally to comprehend the facts that bear on the morality of his action or is unable rationally to comprehend the applicable moral or legal code."[57]

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[56] Morse, above n 55, 23. My italics.
[57] Morse, above n 55, 25. My italics.

In this statement, Morse refers to guidance again, but does not include it in his reasons for making an agent incapable of rationality. However, Morse accepts that the content and degree of rationality that responsibility demands is a normative, moral and political judgment. Elsewhere he refers to the ability to properly use the rules to motivate behaviour and accepts that the actual content of normative incompetence will always be a contingent normative position.[58] As well, we will see later that Morse thinks the lack of empathy so characteristic of adolescent offenders may be sufficient to excuse them from criminal responsibility. For the moment, I simply wish to show that any formulation of what such an agent is must be motivated by normative preferences, and to show that it is possible to form a more detailed definition of what should comprise the three facets that constitute a moral agent. Before making an argument as to why other factors should be considered and what they might include, it is worth remembering how law's ascription of criminal responsibility to children operates on an emaciated view of the moral agent.

What qualities does law consider when making children culpable agents?

When Hart articulated the characteristics of a culpable moral agent, he added that legal systems generally make no effort to ascertain the presence of all three attributes.[59] This indictment of the law's neglect is confirmed by my analysis of the law imputing criminal responsibility to children. Criminal responsibility is found if the child possesses understanding. The common law's original inquiry into discretion and the subsequent statutory and common law inquiry into knowledge of wrong reflect this preoccupation with understanding alone. There is no inquiry into the child's ability to control their conduct pursuant to this knowledge. Criminal responsibility and hence moral agency is imputed on proof of one of the three factors.

Without any inquiry into reason or control of conduct, laws originated to excuse child offenders under 14 on the basis of their lack of understanding, and the law still operates on this basis, although effectively only regarding those under 10. We have seen that this position is inaccurate, largely because children generally do understand the wrongness of their acts, although some over 10 and over 14 may not. More importantly, we

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[58] For Morse, a legally responsible agent is someone 'who is so generally capable [of properly using the rules as premises in practical reasoning], according to some contingent, normative notion both of rationality itself and of how much capability is required'. He also accepts that there is no uncontroversial definition of rationality or of what kind and how much is required for responsibility; that these are normative issues: Morse, above n 55, 20. Morse thinks that 'normative capacity' equates to the type of rationality demanded by the liberal state of its actors to justify criminal punishment.

[59] Hart, above n 55, 218.

have also seen that the legal ascription of criminal responsibility to children is achieved without an adequate finding that the child is a culpable agent.

From the preceding discussion of law, developmental psychology and the attributes of a morally culpable agent, the problem can now be stated like this. It is not that child offenders will often lack knowledge of wrong, although they may well understand an act as wrong in a different sense from that seemingly anticipated by law (a stage 3 type of wrongness). The problem is that the child offender will often lack other qualities – impulse control, empathy, peer resistance and others – that are both within the third element of a moral agent and are necessary to avoid criminal offending. My argument is that the law's lack of inquiry into these matters when ascribing criminal responsibility to children is ethically unjustifiable, at least when doing so for the purpose of punishment. The next section will argue why these other factors are particularly relevant when imputing criminal responsibility to children, and it will then be considered what these considerations should include.

Why should law excuse children? Why should other factors of moral agency be considered regarding children in imputing culpability for the purpose of detention?

In Part 1 I accepted that, while producing inaccuracies – particularly because of the ambiguity of the word 'wrong' and the different developmental stages different children may occupy, cognition of an act's wrongness for the basic purpose of imputing accountability is not a frequently-occurring problem. Indeed, it may be desirable to find children of any age criminally accountable for their acts so they may be given an opportunity to develop the skills necessary to avoid further criminal acts. The problem arises when responsibility is imputed to children based only on age and cognition to justify punishment. It is here that difference amongst subjects becomes important; it is here that it becomes morally wrong to assert that all children are the same. It is here that it is morally unjustifiable not to consider the three facets of moral agency, and in particular to ignore the skill of control of conduct.

For all children the individual's environment, family and peer group will exert a significant influence on their capacity to make moral decisions and their actual behaviour. This argument is supported in the developmental literature; De Vries and Zan explain that:

> "The sociomoral atmosphere colours every aspect of a child's development...Depending on the nature of the overall sociomoral atmosphere of a child's life, he or she learns in what ways the world of people is safe or unsafe, loving or hostile...Adults determine the nature of the

> sociomoral atmosphere in which the young child lives, through daily interactions."[60]

Walkover says that developing moral judgment is a matter not simply of cognitive skill but is also an "affective event developing from the interaction of impulse with the response of key externalities, such as parental approval or disapproval."[61]

Even in children showing signs of internalized sets of controls regarding moral judgment, this does not translate to consistent moral behaviour in that child.[62] A child's capacity to know right from wrong is something different from the child's actual behaviour. This then leaves the child arguably with capacity, but perhaps not with the skills of impulse control, empathy and others that would influence appropriate behaviour pursuant to that cognition. However, I disagree with Walkover when he goes beyond this point to claim that due to the:

> "interactive nature of this process it can be concluded that a child's capacity to master impulses roughly parallels cognitive maturation, the achievement of a basic knowledge of right and wrong, and the internalization of that knowledge."[63]

I think these attributes are not dependent. I think an individual could have highly developed and internalised knowledge of right and wrong behaviour, but could lack the emotional skills of impulse control. After all, this is one reason why the first point made it clear that a child's attainment of cognitive skill did not mean that moral behaviour would be produced.

The skill of control of conduct is particularly important because in general, children think and behave in different ways from older people due to qualitative differences. Their powers of behaviour control (which include the skills of empathy, impulse control, anger management) are different, and so even if having similar understanding, their actions can readily differ from those of an adult. This places children in a different position of individuality from that envisaged by the liberal state in ascribing criminal responsibility.

The key is the realisation that in the majority of cases it is not differences in cognitive ability that determine whether a child commits a criminal act or not, but differences in personal circumstances and skills

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[60] R De Vries and B Zan (1994) Moral Classrooms, Moral Children, Teachers New York: College Press, 43; J Piaget (1964) Six Psychological Studies, Random House, New York, 224-225; National Crime Prevention (1999) Pathways to Prevention: Developmental and Early Intervention Approaches to Crime in Australia, Attorney-General's Department, Canberra.

[61] Walkover, above n 51, 543.

[62] Walkover, above n 51, 542.

[63] Walkover, above n 51, 543.

of emotional control and hence of behaviour control. As we have seen, these circumstances and skills are not relevant for law when finding criminal responsibility. It is my argument that these factors are relevant and should morally preclude the availability of punitive detention except where required for offenders who have committed serious offences involving violence and who pose a threat to public safety, and perhaps for similar offenders who do not lack any of the three facets of moral agency.

To take an example. In July 2001 Queensland's Children's Commissioner, Dr Robin Sullivan, accepted that young Indigenous male offenders viewed imprisonment as a rite of passage, and as something to be proud of. Significantly, Dr Sullivan linked rates of offending among young Indigenous offenders with their lack of effective parenting, the absence of fathers, the presence of neglect and abuse; all making these indigenous children 'innocent victims'. Further, indicating what needs to be done to minimise these outcomes, Dr Sullivan promoted the implementation of a parenting program at a Queensland jail, in an attempt to improve the parenting skills of male Indigenous prisoners who were fathers, and thereby to interrupt the cycle of cross-generational offending.[64]

For a significant proportion of Indigenous child offenders, criminal offending is not something to fear or avoid. Criminal offending and, I would argue, other dangerous activities such as substance abuse, are not phenomena that are reinforced in the home as something to avoid, something to know how to deal with. The essential personal skills in navigating life are not encouraged to develop in this sector of the population in the same way as they are amongst children generally. Indeed, as demonstrated by Dr Sullivan's statement, criminal offending is perversely encouraged rather than guarded against. Here, culture is one influential factor in predisposing certain children to criminal offending. Although cognition of the act's wrongness in the general sense discussed will remain, committing the act is desirable because of the influence of culture and peers, and because of the lack of emotional and behavioural skills necessary to resist these influences. I accept that poverty and multiple other factors influence Indigenous child offending, and I refer to these factors later.

Boys are the other overrepresented sector of the population in the statistics of detained child offenders. I accept that as a crude generalisation, the cognitive perception of right and wrong is influenced, although not determined, by gender. Carol Gilligan's work indicates that girls are more likely than boys to reason about actions based on an ethic of care and responsibility, and of preservation of relationships, while boys are more likely to do so on considerations of rules, logic and outcomes.[65] However, I am arguing that it is not cognition of an act's wrongness that is the major

[64] C Pryor, "Black Sons Want to Follow Fathers to Jail" (2001) The Australian, 18 July, 5.
[65] C Gilligan (1982) In a Different Voice, Harvard University Press, Cambridge MA.

problem, but the ability to control behaviour pursuant to that cognition. Indeed, informed by behavioural data, we can conclude that cognitively, adolescents are not qualitatively different from adults in terms of formal reasoning ability and cognitive moral development.[66]

However, it is the absence of well-developed emotional skills of behaviour control in boys that is more significant in this context. The data also establishes that in general, juveniles are more susceptible than adults to peer pressure, tend to be more impulsive, and that 'poor judgment' more substantially affects criminal conduct of adolescents as a class.[67] Applied to boys who commit criminal offences, this susceptibility to peer pressure, combined with poor judgment and poor impulse control is likely to motivate offences serious enough to produce sentences of detention. Significantly, it is these skills of behaviour control that are likely to become developed in older children and adults, but which do not generally characterise younger children. This is particularly so of children who inhabit environments conducive to criminal offending.

This section has argued why control of conduct should form a required part of moral agency, particularly for children because of their general qualitative differences from adults, and because the development of these skills is inhibited by the child's early environment, and because the development of these skills usually takes time, usually until late adolescence and adulthood. The last task in this discussion is to suggest some of the skills this facet of control of conduct should include. To do this requires some discussion of the characteristics of young offenders and some acknowledgment of literature concerning what skills of behaviour control promote good conduct.

What factors should be considered when determining the presence of a moral agent's control of conduct?

Characteristics of young offenders

Unsurprisingly, since children generally have less ability to control their behaviour due to their occupation of volatile developmental stages and due to their susceptibility to influential environments, children who commit criminal offences exhibit particular patterns of behaviour and backgrounds. Research in Australia and overseas identifies frequently occurring environmental and behavioural characteristics of child offenders.

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[66] I accept Morse's review of this research: Morse, above n 55, 52-53.

[67] Morse, above n 55, 56.

[68] National Crime Prevention, above n 60; A Leschied and S Wilson (1988) 'Criminal Liability of Children Under Twelve: A Problem for Child Welfare, Juvenile Justice or Both?' Canadian Journal Of Criminology, 30, 1, 17-29, 26; E Currie (1998) Crime and Punishment in America, 4.

Risk factors for child criminal offending include lack of parental emotional support and supervision; exposure to parental abuse, violence and neglect; oppositional behaviour such as aggression; learning problems at school resulting in poor school performance, and victimization at school. These factors commonly become manifested in behaviour problems including aggression.[68] Recent Australian research concludes that aggression in preschool years is a powerful predictor of continuing adolescent aggressive behaviour, delinquent behaviour and contact with agencies known to deal with delinquents.[69] Other research identifies the combined influence of economic stress, lack of parental supervision and exposure to the influence of delinquent peers in the same neighbourhood.[70] The Australian Temperament Project, a longitudinal study beginning with 2443 children in 1983 and completed in 2000, finds that children aged 9-10 who continued to exhibit aggressive and anti-social behaviour first displayed in toddlerhood and pre-school were usually boys who had learning difficulties, socialising difficulties, histories of difficult temperament and difficult mother-child relationships (father-child relationships not noted), and were subjected to more severe parental disciplinary practices than comparison children. These features characterised aggressive children aged 11-13 as well. The Project also finds that the strongest risk factors of anti-social behaviour at 15-16 years of age were previous oppositional behaviour, poor school performance and association with deviant peers at 13-14 years.[71]

The impact of such forces seems inescapable, and unfortunately, many of the most influential factors arise in the child's home, seemingly beyond the reach of potential intervention. Yet there is reason for encouragement and hope. Reviews of crime prevention and intervention programs indicate the ability to identify those at risk of developing antisocial lifestyles, and significant success from programs responding to childhood aggression and adolescent antisocial behaviour.[72] The Pathways to Prevention Report emphasises that intervention at important times in children's development can reduce the likelihood of children at risk committing criminal offences.[73] Leschied also concludes that children at risk need strong interventionary services and creative methods of interrupting cyclical early childhood development problems that produce subsequent delinquent behaviour.[74]

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69 W Bor, J Najman, M O'Callaghan, G Williams and K Anstey (2001) 'Aggression and the Development of Delinquent Behaviour in Children', Trends and Issues in Crime and Criminal Justice, No 207, Canberra: Australian Institute of Criminology, 1-6, 4-5.

70 D Weatherburn and B Lind (1998) 'Poverty, Parenting, Peers and Crime-Prone Neighbourhoods' Trends and Issues in Crime and Criminal Justice, No 85, Canberra: Australian Institute of Criminology.

71 M Prior, A Sanson, D Smart and F Oberklaid (2000) Pathways From Infancy to Adolescence: Australian Temperament Project 1983-2000, Melbourne: Australian Institute of Family Studies, 27-28, 50.

72 Bor, above n 69, 4-5.

73 Pathways to Prevention, above n 60, 11.

74 Leschied, above n 68, 26.

Morse accepts that many personal and environmental variables make it easier for a person to behave well, and that character traits such as empathy, self-control and temperament, combined with moderate or undisturbing life situational characteristics have important effects on the individual's actual behaviour. However, he dismisses these factors as unhelpful when investigating the theory behind excusing criminal conduct.[75]

I disagree. As Morse elsewhere seems to concede – he argues for "rough mitigating doctrines" to consider the moral relevance of individual factors that make it more difficult for some to behave appropriately than others; a "generic, mitigating, partial excuse"[76] – these factors are instructive. Although these factors, such as a richer understanding of control of conduct, may not underpin the historical and still current rationale of criminal law, they can provide a better foundation for a different conception of full moral agency. They explain the attributes that characterise the overwhelming majority of individuals who do not breach criminal laws. They point towards the skills conducive to avoiding criminal offending.

What skills of control of conduct should be considered in the moral agent? What behavioural skills promote good conduct?

What qualities should be present to satisfy this factor of moral agency? What should be meant by control of conduct's 'the ability to conform to decisions when made'? Being a normative question, there is much scope for argument here. In the context of evidence from contemporary discourses beyond law, the concept clearly goes beyond such obvious categories as the loss of control brought on by seizure, and the lack of physical control exhibited due to other disease. The skill of control of conduct is so clearly behavioural that evidence must be found in the work of contemporary experts in emotional intelligence, behaviour and temperament. Because this area of inquiry is relatively new, and because it is relevant to discourses such as education as well as law, an informed debate across these discourses and ongoing inquiry into them may be

[75] Morse, above n 55, 44. Morse rejects what he views as unsatisfactory justifications for excuse, such as lack of free will, lack of choice, determinism, causation and lack of intent (32-44). Morse also thinks that an unfortunate disposition or even a combination of this with 'situational variables' will not warrant reduced or excused culpability. Moral and legal expectations 'set a minimum standard for what is required for responsible action and not everything that would help an agent to behave well is or should be included in the standard. As long as an agent possesses the minimum requirements for normative competence [rationality], she is capable of meeting moral obligations, and it is not unfair to hold her responsible, even if it is harder for some people than for others...Bad luck is not an excuse unless it produces an excusing condition, such as lack of normative competence.' (31). Morse also rejects lack of self-control as a substantial general reason justifying an exculpatory doctrine. Morse thinks this reason does not inform the excuses currently on offer – I am arguing that in the case of young individuals it should.

[76] Morse, above n 55, 32.

profitable in diverse ways. Accordingly, rather than trying to propose a model for the criminal law, my intention here is simply to make some suggestions informed by the evidence regarding the characteristics of child offenders, and by evidence from behaviourists specialising in emotional intelligence.

I will begin with Morse, who despite general comments about the irrelevance of a person's temperament, thinks that to be criminally responsible and culpable for an act, an individual should possess the emotional faculty of empathy. That is, "the ability to empathize and to feel guilt or some other reflexive reactive emotion". The reason is that:

> "..unless an agent is able to put oneself affectively in another's shoes, to have a sense of what a potential victim will feel as a result of the agent's conduct, and is able at least to feel the anticipation of unpleasant guilt for breach, one will lack the capacity to grasp and be guided by the primary rational reasons for complying with moral expectations."[77]

Morse thinks that lack of these qualities makes it too difficult for the individual to follow the rule because he or she will be unable either to grasp (understand) or to be guided by (to control their behaviour) the good reasons not to offend.[78] Presumably the 'too difficult' nature of an appropriate response absolves the individual of blame. Note that here Morse refers to the capacity to feel empathy and guilt, and not the feeling of empathy and guilt regarding the criminal act in question; this is not required in his scheme.[79]

On Morse's best normative vision, empathy is then a condition of normative competence, a potentially critical distinguishing variable between those who are morally culpable and those who are not.

> "Although adolescents have adequate formal reasoning powers and understanding of the content of the moral rules, and sufficient life experience to understand the facts, including the consequences of the serious crimes that concern us, they may fully lack the general capacity for empathy that is a component of full moral agency."[80]

Significantly, the lack of empathy in adolescents is admitted to be a normal developmental stage, which will usually be resolved with time. The reference to the development of this crucial skill over time is significant, as in general, the development of other relevant skills enabling an agent to control their conduct also requires time; a reason in itself not to make the young fully responsible.

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[77] Ibid 26.
[78] Ibid 30.
[79] Ibid 26.
[80] Ibid 60.

Former Harvard academic Daniel Goleman has written extensively about the skills people need to be able to control their conduct. In particular, in his book *Emotional Intelligence*, Goleman writes of the importance of developing certain emotional skills in children so that they become better able to navigate life without becoming susceptible to criminal offending and other social problems.[81] Drawing extensively on behavioural and sociological literature, Goleman emphasises the importance of the skills of empathy (the ability to know how another person feels), resisting impulses, self-awareness, control over emotions (especially anger), and social interpersonal intelligence (getting on with others).[82]

A central theme in the book is that these skills can be learnt and need to be learnt. It is accepted that the earlier in life the skills are learnt then the easier it is to develop them.[83] Goleman refers extensively to the successful results of school programs that aim to develop these skills in children, but laments the lack of priority so far given to them by policymakers.[84]

The reason for this lament is that more and more children are suffering because of the absence of these skills, through poor school performance, substance abuse, criminal offending, depression, suicide, early pregnancies, and an inability to cope with the inevitable difficulties of life.[85] In the context of violent criminal offending by juveniles, Goleman explains:

> "One reason they are so poor at this basic life skill [of avoiding disputes]...is that as a society we have not bothered to make sure every child is taught the essentials of handling anger or resolving conflicts positively – nor have we bothered to teach empathy, impulse control, or any of the other fundamentals of emotional competence. By leaving the emotional lessons children learn to chance, we risk largely wasting the window of opportunity presented by the slow maturation of the brain to help children cultivate a healthy emotional repertoire."[86]

These comments are just as significant in the context of all crime committed by children. The evidence from behavioural inquiry and from analysing the features of young offenders strongly suggests that offenders frequently do not possess these skills, and that the development of these skills of control of conduct enables children to avoid criminal offending and a range of other destructive behaviours. Together with the evidence concerning the characteristics of young offenders in Australia, the insights from Goleman's field of inquiry are powerful indicators about what our best normative moral position might be when ascribing criminal

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81 D Goleman (1995) Emotional Intelligence, London: Bloomsbury.
82 Ibid. Regarding empathy, see 96-110; resisting impulses 78-95; self-awareness 46-55; control over emotions 56-77; and social interpersonal intelligence 111-126.
83 Ibid xiii.
84 Ibid 261-285; Appendix F.
85 Ibid 231-234.
86 Ibid 286.

responsibility to children, and when dealing with young offenders.

Dispositional consequences

For Morse, although the characteristics of impulsivity, riskiness, and peer susceptibility that distinguish adolescents from adults do not affect their responsibility, this lack of empathy should make adolescents less responsible or not responsible at all, and dispositional consequences need to consider this.[87] The crucial acceptance here is that:

> "wrongdoing in these cases is in substantial measure a product of juvenile immaturity that will be outgrown under proper conditions. Once outgrown, the wrongdoer is far less likely to make such "mistakes" in the future. The question, of course, is what possible dispositions will facilitate maturation and protect the public from dangerous juveniles."

To Morse, this is a difficult task as despite persuasive evidence of successful treatment programs, it is not easy to diagnose the individual's real need. It is assumed that reformatories and prisons are not appropriate rehabilitative environments, and that less secure institutions may not provide sufficient public safety and may also constitute a criminogenic atmosphere rather than a rehabilitative one.[88] It is obviously this issue that demands further research, because it promises real results in terms of rehabilitation that will also produce obvious long term results in other areas, such as economics.[89]

Ultimately Morse reaches no conclusion about whether, due to this lack of empathy, mid- to late-adolescents should be less criminally responsible than adults. He does think that:

> "we must very carefully identify why adolescents might be treated differently, and if fairness requires differential treatment for the class,

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[87] The relevance of empathy to young offenders' culpability bothers Morse, above n 55, 59, as he thinks there should be no difference between the liability of mid- to late adolescents and adults on this ground; why should young offenders be treated more leniently than adults on the same reasoning? My responses here are twofold. First, perhaps it is not just to hold adults completely responsible if they lack empathy (and other skills of behaviour control may be just as important). Second, a harsher position: there may be a reasonable expectation held by law and society that by a certain (hopefully leniently-set) age, individuals are expected to have developed these skills themselves, despite the presence of a less than ideal childhood and other circumstances. A question here is whether this is a reasonable expectation or not. I make no attempt to argue one way or the other in this discussion, although it is a relevant question for further exploration.

[88] Morse, above n 55, 65.

[89] In 1990 it was estimated that the cost of detaining juveniles in Australia was $70 million per year: Bor 5 citing I Potas, A Vining & P Wilson (1990) Young People and Crime: Costs and Prevention, Canberra: Australian Institute of Criminology, 31-48.

> it also requires that adults with the same responsibility diminishing characteristics should be treated equally."[90]

I think fairness would not require differential treatment for the class, but would require differential treatment for those within the class found to not have the skills necessary for moral agency and not to have had a reasonable opportunity to develop those skills. Fairness demands not just the application of rules to a class, but the application of rules to individuals within the class on individualized examination. As Morse himself admits, when adjudicating culpability, we must realize that not all members of the adolescent class are alike. This might justify an individualized judgment of an offender's responsibility and desert. Of course, this would be more difficult than a formulaic application and would require judgments of an offender's cognitive and emotional status, 'but perhaps justice demands the attempt.'[91]

Here is the key to the issue. It is not simply the finding of responsibility that is the challenge, but of making justifiable dispositional decisions.[92] There is a moral gulf between finding a child criminally accountable in order to claim he or she can justifiably be punished, and finding a child criminally responsible so that the child can be provided with opportunities (which they may never have had before) to develop the skills necessary to avoid reoffending. It must be observed that Morse is concerned particularly with dangerous juvenile offenders. My main concern is simply with juvenile offenders as a group; I assume that most are not dangerous and so, at least for these, detention is not justifiable. This assumption is justified in the Australian context since most child offenders commit offences that are not serious violent offences; property offences remain most often committed.[93] Further, there is evidence that juveniles who commit property crimes and juveniles who are given custodial sentences are more likely to reoffend.[94]

I agree that even in an ideal system of individualized assessment that includes for the purposes of finding moral agency and responsibility a consideration of empathy and other facets of behaviour control, some child

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[90] Morse, above n 55, 61.

[91] Ibid 62-63. The idea that this individualized form of judgment would be just, whereas a formulaic application of a rule would not, accords with the ideas of some Postmodern thinkers. For example, see Jacques Derrida (1992) 'Force of Law: The Mystical Foundation of Authority', in D Cornell, M Rosenfeld, D Carlson (eds) Deconstruction And The Possibility Of Justice, New York: Routledge, 3-67.

[92] Morse, above n 55, 65.

[93] S Mukherjee, C Carcach & K Higgins (1997) Juvenile Crime and Justice: Australia 1997, Research and Public Policy Series, No 11, Canberra: Australian Institute of Criminology, 49; Bor 5.

[94] M Cain (1998) 'An Analysis of Juvenile Recidivism' in C Alder (ed) Juvenile Crime and Juvenile Justice, Research and Public Policy Series No 14, Canberra: Australian Institute of Criminology, 13. Note also that in all jurisdictions the most highly represented group of offenders is males aged between 15 and 17, with offences commonly property offences, personal offences, traffic offences and other offences related to alcohol and drugs.

offenders will be found responsible and they should be treated according to the current theory of punishment; myself preferring one that was rehabilitative and that only detained if for reasons of public safety. Here, one would place serious violent young offenders who presumably would need intensive rehabilitation to develop the emotional skills necessary to avoid reoffending. They would also need changes in life situation; employment, drug rehabilitation, influence of positive support systems and the like. While discussing this point it is important to accept that this process will never guarantee success or even improvement in all cases.

Concluding thoughts

Morse concludes that:

> "neither common sense nor behavioural science data resolve the issue of juvenile responsibility. How we should respond to juvenile offenders is ultimately a moral judgment that must be derived from our best normative account of responsibility."[95]

Law's moral judgment ignores multiple influential factors and simply demands that by a certain time, regardless of an individual's circumstances or personal development, every individual is expected to possess the understanding of what is legally acceptable behaviour and to behave accordingly pursuant to skills of behaviour control. My question is whether this temporal expectation is morally justifiable or not, and if it ever is, at what stage, and under what circumstances. It is clearly understandable in logistical terms because it is easily measurable and bows to electoral popularity in claiming to respond to crime. Yet when a young offender does not have the skills advantageous to avoid criminal offending, and if their early environment is deleterious to their emotional development, then this gives us a morally justifiable reason to excuse people of young age from culpability for the purpose of detention as punishment.

I am arguing that the State must also bear some responsibility for ensuring that individuals have a minimum opportunity to take individual responsibility for developing their own selves and abilities. This involves a demand on the State for education in emotional skills (not just academic skills) that are known to develop cognitive and behavioural skills that vastly reduce the likelihood of individuals committing criminal acts. The State must bear some responsibility since the development of emotional skills cannot be guaranteed to occur in the private sphere – indeed, this is where many children receive an unfair allotment of damaging influences – and the liberal State generally refuses to intervene in the private

[95] Morse, above n 55, 17.

sphere. I argue that without this State responsibility, it is unjust to make young children below certain stages of emotional development culpable for criminal acts to justify detention as punishment. Due to their lack of emotional skills, and due to the lack of a reasonable passage of time in which it may be fair to demand that they have developed those skills themselves, they do not yet have the ability to consistently respond appropriately to difficult situations. Evidence from the discourses of psychology and sociology suggest actions that not only are more justifiable responses to most cases of child offending, but also form effective preventionary tools. For us to ignore them is morally irresponsible.